



U.S. Department  
of Transportation

**Federal Highway  
Administration**

# Memorandum

Subject ACTION: Interim Guidance on Applying Section 4(f)  
On Transportation Enhancement Projects and  
National Recreational Trails Projects

Date: **AUG 22 1991**

From Director, Office of Environment  
and Planning

Reply to HEP-31  
Attn of

To Regional Administrators  
Federal Lands Highway Program Administrator

The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), in Section 1007(c), created "Transportation Enhancements" and identified 10 specific types of activities which could receive such funds. The ISTEA, in Section 1302, also created the National Recreational Trails Funding Program (often referred to as the Symms Act), which is designed to fund "recreational" trails projects. The objective of both of these programs is to enhance resources. In many cases, these two programs would be considered to also fall under the strict interpretation of Section 4(f) requirements since both programs, especially the National Recreational Trails, could involve working on a 4(f) protected resource. This office has received numerous regulation/policy interpretation requests on whether and how to apply Section 4(f) to these two programs.

However, ISTEA and Section 4(f) are directed towards preserving, protecting, and enhancing Section 4(f) properties. The ISTEA, by its very title, is looking for ways to make program and project delivery more efficient. Thus, it is inconceivable that these two statutes, both of which contain preservationist purposes, should be interpreted in such a manner that potential enhancement and trail project applicants would be saddled with burdensome paperwork, a rigorous alternatives analysis process, and circulation requirements which would substantially delay project implementation when the sole purpose of the project is to enhance or create a 4(f) protected resource. In keeping with the goals of the current Administration and mandates from the National Performance Review, this guidance will simplify project processing by streamlining applicable environmental requirements and review times.

This office has determined that Section 4(f) should not be applied to the National Recreational Trails Funding Program and that it should only be applied to the "Transportation Enhancements" Program when certain conditions are not met by each project. The attached interim guidance contains the basis for these determinations.

Because the Federal Transit Administration, the Federal Railroad Administration, and the Federal Highway Administration are currently in the early stages of issuing a Notice of Proposed Rulemaking to revise 23 CFR 771, which contains the Agency's environmental and 4(f) requirements, we are issuing these determinations as an interim measure until changes to 23 CFR 771 can be promulgated through the regulatory rulemaking process. In order to ensure that other resource agencies, organizations, and individuals with an interest in this area are aware of these determinations, we will publish this interim guidance in the *Federal Register* as a final policy interpretation. Once 23 CFR 771 has been revised to address this subject, the interim guidance will become null and void.



Kevin E. Heanue

Attachment

**Section 4(f) Interim Guidance  
on  
Transportation Enhancement Activities  
and the  
National Recreational Trails Program**

All of our current regulations, policy, and guidance on Section 4(f) has been written to comply with 49 U.S.C. Section 303, which is the recodified version of Section 4(f) of the 1966 DOT Act. Section 303 reads as follows:

- (a) It is the policy of the United States Government that special effort be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.
- (b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities and facilities.
- (c) The Secretary may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, recreation area, refuge, or site) only if:
  - (1) there is no prudent and feasible alternative to using that land; and
  - (2) the program or programs includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

Section 138 of Title 23 U.S.C. (which applies only to the Federal-aid highway program), contains similar language, with one distinct difference. The portion of Section 138 that parallels Section 303(c) has an additional sentence at the end that reads, "In carrying out the national policy declared in this section, the Secretary, in cooperation with the Secretary of the Interior and appropriate State and local officials, is authorized to conduct studies as to the most feasible Federal-aid routes for the movement of motor vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas."

Because the "Transportation Enhancements" Program and the National Recreational Trails Funding Program are administered by the Federal Highway Administration (FHWA) which is an Agency of the U.S. Department of Transportation, both are subject to the provisions of Section 4(f) as programs or projects just as the Federal-aid highway program is subject to these provisions. Thus, determinations can be made at either the program or project

level that the provisions of Section 4(f) do not apply provided certain conditions are satisfied. Because of past experience with highway projects having impacts ranging from no impact to total acquisition, when the FHWA has used a project level determination. Basically, a two-step process is used when determining whether or not to prepare a Section 4(f) evaluation for an individual project, and should one of the steps not be satisfied, the provisions of Section 4(f) would not apply to the project in question. This two-step process is as follows:

1. First, it must be determined that we are in fact dealing with a resource that is protected by the provisions of Section 4(f). These resources are parks, recreation areas, wildlife/waterfowl refuges, and historic/archeological sites on or eligible for the National Register of Historic Places.
2. Second, there must be a "use" of land from the Section 4(f) resource for a transportation facility/project. Title 23 CFR 771.135(p) defines "use" in three ways: (1) When land is permanently incorporated into a transportation facility, (2) When there is a temporary occupancy of land that is adverse in terms of the statute's preservationists purposes as determined by the criteria in paragraph (p)(7) of 23 CFR 771.135, and (3) When there is a constructive use of land.

Note: At this point we are only dealing with whether we have a resource and whether we are "using" land from that resource. We are not dealing with the "feasible and prudent" alternative test.

The FHWA's Section 4(f) Policy Paper dated September 24, 1987, provides additional information on implementing both of these steps on individual projects. But, as stated earlier, should one or both of the above steps receive a negative response, a 4(f) evaluation is not required. What is required is that this fact be documented in the NEPA document for the project in question. Although, the two new ISTEA programs have some commonalities, they are quite different. Thus, the remainder of this guidance will deal with how the two-step process should be implemented for each of these new ISTEA programs.

### Transportation Enhancement Activities

Section 1007 of ISTEA established the Surface Transportation Program (STP) Funds, of which the Transportation Enhancement Activities are a part. Currently, only the following ten activities are eligible for funding as transportation enhancements:

1. Provision of facilities for pedestrians and bicycles.
2. Acquisition of scenic easements and scenic or historic sites.
3. Scenic or historic highway programs.
4. Landscaping and other scenic beautification.
5. Historic preservation.
6. Rehabilitation and operation of historic transportation buildings, structures, or facilities (including historic railroad facilities and canals).
7. Preservation of abandoned railway corridors (including the conversion and use thereof for pedestrian or bicycle trails).
8. Control and removal of outdoor advertising.
9. Archeological planning and research.
10. Mitigation of water pollution due to highway runoff.

While all of the above activities could potentially impact 4(f) resources, we have determined that of these ten activities, six (TEAs 1, 2, 3, 5, 6, and 9 as listed above) have the greatest likelihood of impacting a 4(f) resource. This is because the resource to be enhanced by the TEA project is in all likelihood a 4(f) protected resource. Therefore, the first step of the two-step process is usually satisfied, the resource is a 4(f) protected property. The second step must then be analyzed. Are we using the resource based on the three types of "use" contained in 23 CFR 771.135(p)? Upon reviewing existing regulations, policy, and guidance, we have determined that the question of "use" for TEAs 1, 3, 6, and 9 (as listed above) are already covered by existing regulations, policy, and/or guidance. The applicable regulation, policy, and/or guidance is as follows:

1. Bicycle and pedestrian facilities (TEA #1) is covered by our May 23, 1977 memorandum (copy attached) titled, "Negative Declaration/Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects." Although old, this memo is still valid.
2. Historic highway programs and the rehabilitation/operation of historic transportation buildings, structures, or facilities TEA #3 and 6 are currently covered by 23 CFR 771.135(f). This section of our regulation outlines conditions under which Section 4(f) would not apply to projects that restore, rehabilitate, or perform maintenance on transportation facilities that are on or eligible for the National Register of Historic Places. The term "facilities" is being broadly defined in this case to include buildings and structures, but they must have a transportation related history. The Scenic Highway Program (the other half of TEA #3) is merely a designation applied to existing facilities and does not grant Section 4(f) protection. Thus, a designation of

scenic is an identification tool similar to designations such as a U.S. Route, State Route, "I", etc. and alone does not invoke Section 4(f). TEA #9, Archaeological planning and research, is covered by the provisions of 23 CFR 771.135(g), which state that 4(f) does not apply should an archaeological resource on/eligible for the National Register be important only for the data which it contains, thus, not warranting preservation in place.

Thus, only TEA #2 and 5 require some form of regulation/policy interpretation at this time. TEA's #2 and 5 involve the acquisition of scenic easements and scenic or historic sites, and the preservation of historic structures, respectively. It should be noted that the simple designation of something as scenic does not automatically grant it 4(f) protection. This protection would only be granted if the scenic designation is basically an adjective used to further describe a resource already granted protection, such as a scenic trail or historical scenic site. However, historic sites are 4(f) protected resources, provided they are on or eligible for the National Register. Thus, what must be analyzed is whether we are using land from the resource in keeping with the three types of use in 23 CFR 771.135(p). We have examined this matter extensively and render the following determinations:

- (i) Section 4(f) is invoked whenever Section 4(f) land is acquired for permanent incorporation into a transportation facility. However, the simple act of acquiring land/property does not automatically invoke 4(f). It is the change in land use from 4(f) protected to a transportation facility that causes 4(f) to be invoked. If the land/property is being acquired solely for the protection, preservation, or enhancement of a scenic or historic site, the official with jurisdiction has been consulted and concurs with the acquisition, and conditions, such as historical covenants, deeding to other governmental land management agencies, etc., are in place to provide long-range protection. Then, the provisions of 4(f) do not apply since there is no permanent incorporation of land into a transportation facility.
- (ii) Generally, there will not be many instances of temporary occupancy of scenic/historic land for these two TEAs. However, should there be a temporary occupancy, as long as it can be documented that this occupancy is not adverse in keeping with the provisions of 23 CFR 771.135(p)(7).<sup>1</sup> Then, 4(f) does not apply.
- (iii) Constructive use occurs when the proximity impacts from a transportation project (the TEA in this case) substantially impairs the activities, features, or attributes of an adjacent 4(f) protected resource. Because constructive use deals with adjacent resources, it must still be examined for these and other TEAs.<sup>2</sup> However, we feel this would be a very rare occurrence.

---

<sup>1 2</sup> Coordination with the official with jurisdiction is required prior to making final determination on temporary occupancy and construction use.

The following examples were developed to aid in making determinations on whether there is a "use" of land from a 4(f) resource on a case-by-case basis. These examples were developed in keeping with existing guidance/policy and the three determinations made above.

- A bikeway constructed in a park in a case where the bikeway is under the park agency's jurisdiction would not be a 4(f) use since the parkland is not permanently incorporated into a transportation facility, but continues to function as parkland.
- A bikeway constructed in a park in a case where the bikeway is not under the park agency's jurisdiction would be a Section 4(f) use since parkland would be permanently incorporated in a transportation facility. In this case FHWA's May 23, 1977 memorandum titled, "Negative Declaration/Section 4(f) Statement for Independent Bikeway or Walkway Construction Projects" would apply.
- Acquisition of fee simple or easement interests in scenic or historic sites would not as a general rule be a Section 4(f) use unless the site were altered in an adverse way or the setting were disturbed in such a way that resulted in the site being permanently incorporated into a transportation facility, being temporarily and adversely occupied by a transportation facility, or being constructively used by proximity impacts from a transportation facility. Absent the above conditions, acquisition of a property interest in a scenic or historic site would not constitute a Section 4(f) use.
- Installation of interpretive facilities (signs, kiosks, etc.) for scenic or historic highways located within parks or refuges done at the request of the park or refuge manager, would not be a Section 4(f) use since the improvements would be a park or refuge amenity rather than a feature of the transportation facility (i.e. the improvements support the park/refuge function, not the transportation function and are, therefore, more properly an element of the park or refuge rather than a permanently incorporated element of the transportation facility).
- Rehabilitation of a historic transportation building, structure, or facility would not be a Section 4(f) use (See 23 CFR 771.135(f)) provided the proposed work would not adversely affect the historic qualities of the facility.
- Preservation of a historic non-transportation property would typically not be a Section 4(f) use since the property would ordinarily not be permanently incorporated into a transportation facility, and temporary adverse occupancy and constructive use would generally not be an issue.
- Archeological planning and research activities would not constitute a Section 4(f) use in those cases where the archeological field work is restricted to sites that are not being permanently incorporated into a transportation facility, or if permanently incorporated, are not important for preservation in place (See 23 CFR 771.135(g)).

National Recreational Trails Funding Program (NRTFP)

With the inclusion of this program in ISTEA, FHWA has the task of administering this recreational program at the Federal level. As stated earlier, FHWA has used a project level 4(f) determination for complying with the provisions of Section 303 of 49 U.S.C. and Section 138 of Title 23 U.S.C.. However, both of these sections allow a program level determination (see wording on pg. 1 for both of these laws). We do have some precedent in this area. The Great River Road program was excluded from the provisions of Section 4(f) at the program level rather than requiring normal project level determinations. A determination was also rendered that 4(f) did not apply to projects involving the construction of access ramps to public boat launching facilities within 4(f) resources. In both cases, it was found that applying the test of "feasible and prudent alternatives" resulted in alternatives being developed that were impractical and unreasonable and that would result in positive benefits to the resource being precluded in order to totally avoid impacting the 4(f) resource. This is not in keeping with the goal and spirit of 4(f). Since the NRTFP is similar to these two programs for which 4(f) did not apply, we have determined that Section 4(f) does not apply to the NRTFP. This determination is based on the following facts and reasoning:

1. The NRTFP is officially designated a recreational program at the Federal level, and the projects to be funded under the program must be included in or shown to further the goals of the Statewide Comprehensive Outdoor Recreational Plan (SCORP) which is reviewed and approved by DOI. Thus, all NRTFP projects are recognized as recreational projects at the Federal level.
2. Section 4(f) applies when there is a "use" of land from a Section 4(f) protected resource. "Use" is defined in 23 CFR as being "(i) when land is permanently incorporated into a transportation facility; (ii) when there is a temporary occupancy of land that is adverse in terms of the statute's preservationist purposes...; (iii) when there is a constructive use of land". None of these "uses" will occur under the NRTFP e.g., (1) land will not be permanently incorporated into a transportation facility since all facilities will officially be recreational facilities and seldom if ever will there be any transfer of land from one party to another, (2) since most projects will occur inside the boundaries of a 4(f) resource, the projects generally will not involve temporary occupancy of land. However, where temporary occupancy does occur, the program is intended to further and enhance, not hinder, the preservationist purposes espoused by Section 4(f), and (3) constructive use occurs when proximity impacts from transportation projects substantially impair 4(f) resources. Since NRTFP projects are recreational projects the provisions of "constructive use" do not apply.



3. Since most projects will occur within the boundaries of a 4(f) protected resource, owned in most cases by the funding applicant, it is unreasonable to request that the applicant seek land outside his own property to perform a project. Therefore, the evaluation of prudent and feasible alternatives to performing the project within the applicant's property boundaries is unreasonable and impractical.
4. The final receiver of funds will in most cases be either a public recreational agency or a private recreational entity. Therefore, the funds have no transportation linkage other than the role FHWA plays in administering this recreational program.
5. Discussions have been held with other Federal agencies normally involved in the funding of trail projects such as the U.S. Forest Service, the National Park Service, and the Bureau of Land Management. Although they did express some concerns about overall program implementation, they were comfortable with the approach that 4(f) should not be applied to this program.

No further work is required by our region or division offices from a Section 4(f) standpoint for the NRTFP. However, it must be remembered that NEPA and other applicable Federal laws, such as the Clean Water Act, the National Historic Preservation Act, etc., must still be complied with by the State/local applicant to obtain program funds. We suggest that this compliance be documented under our normal project development process using the NEPA document as the tool.